SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 1084

S. FELICIONE & SONS FISH COMPANY, INC.,
Petitioner,

v.

CITIZENS CASUALTY COMPANY OF NEW YORK,
Respondent

BRIEF OF RESPONDENT ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JURISDICTION

In this brief, Petitioner S. Feliciene & Sons Fish Company, Inc., who was the Plaintiff in the District Court in and for the Middle District of Florida, Appellee in the United States Court of Appeals for the Fifth Circuit, will be referred to as "Petitioner". Respondent Citizens Casualty Company of New York, who was the Defendant in the United States District Court in and for the Middle District of Florida, Tampa Division, and

Appellant in the United States Court of Appeals for the Fifth Circuit will be referred to as "Respondent". The following symbols will be used:

A - Appendix of Petitioner, S. Feliciane & Sons Fish Company, Inc.

B - Brief of Petitioner, S. Feliciane & Sons Fish Company, Inc.

This Petition for Writ of Certiorari is governed by Rule 19(1)(b) of the Supreme Court Rules:

> "Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial laws; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for an exercise of this Court's power of supervision."

It is plain that jurisdiction must depend upon conflict with another decision of the Supreme Court or another Court of Appeals. *Apparently*, Petitioner seeks to assert jurisdiction on the basis of conflict with *Calmar Steamship Corporation v. Scott*, N.Y. 1953, 345 U.S. 427, 97 L.Ed. 1125, 73 S.Ct. 739, and the claim that Petitioner was deprived of due process of law by the decision rendered by the Fifth Circuit Court of Appeals in *S. Feliciane & Sons Fish Company, Inc. v. Citizens Casualty Company of New York* (5th Cir. 1970) 430 F.2d 136. (A 2-11) (B 2-3)

Petitioner primarily awaits the merits of the Circuit Court of Appeals' decision questioning the legal propriety of the finding that the peril "assailing thieves" was incorrectly defined by the Court of Appeals' decision. In reality, Petitioner seeks a second appeal on the merits here supported by unrealistic and completely inadequate grounds for invoking jurisdiction of this Court on Petition for Writ of Certiorari. A cursory review of Calmar, supra, and the frail claim of denial of due process reveals the complete lack of merit of this Petition.

It is therefore the initial contention of Respondent that the Petitioner has wholly failed to show grounds for invoking the jurisdiction of this Court under Supreme Court Rule 19(1)(b).

QUESTIONS PRESENTED

POINT I

DOES THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR CONFLICT WITH *CALMAR* v. *SCOTT*, N.Y. 1953, 345 U.S. 427, 97 L.Ed. 1125, 73 S.Ct. 739?

POINT II

HAS PETITIONER BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE AT BAR?

POINT III

WAS THERE COVERAGE UNDER RESPONDENT'S MARINE INSURANCE POLICY FOR THE CONSTRUCTIVE TOTAL LOSS OF THE MISS SONDRA LEIGH?

STATEMENT OF THE CASE

On November 9, 1967, the MISS SONDRA LEIGH owned by plaintiff, S. Pelicione & Sons Fish Company, Inc., under the command of Captain Lee Tindall, and with two crewmen on board, the rigman, Dubon, and an unidentified Mexican shrimp header, departed Port Isabelle, Texas, to fish for shrimp on the flats of Campeche, Mexico. She arrived about November 14, 1967, and fished the waters until November 18, 1967, when she, along with ten or fifteen other fishing vessels, congregated on the flats to discharge her catch into the vessel JUNE, a service boat which would take the catch into port.

The MISS SONDRA LEIGH dropped anchor in the vicinity of the JUNE about 3:30 P. M., some ten to twenty miles in the Gulf of Mexico in international waters. The ESTO FLEET, a 72 foot steel hulled vessel commanded by Captain Frank Paprocki, was anchored about 150 yards to the starboard of the MISS SONDRA LEIGH. The shrimp was transferred from the MISS SONDRA LEIGH to the JUNE just before dark. During the transfer of the shrimp the ESTO FLEET came portside and made up to the MISS SONDRA LEIGH. Captain Paprocki emerged from the wheel house of the ESTO FLEET, apparently under the influence of alcohol, with a gun in one hand and a bottle of whiskey in the other. He shot into the air and the water and then fired two shots into the galley and wheelhouse of the MISS SONDRA LEIGH. Captain Tindall told Captain Paprocki to stop shooting the gun. This request made Captain Paprocki mad and he began arguing violently with Captain Tindall.

Captain Paprocki then boarded the MISS SONDRA LEIGH and asked Captain Tindall and Dubon to drink with him. They refused. Captain Paprocki boarded the vessel portside to the MISS SONDRA LEIGH and then returned. He refused to disengage the ESTO FLEET, so the MISS SONDRA LEIGH got underway with the ESTO FLEET in tow. Dubon went below to prepare an ice bed for further shrimping. He heard two shots from the bow and, shortly after that, two shots by the hatch.

Dubon came topside and saw Captain Tindall dead, lying on the nets on the starboard side. The Mexican national was also dead, lying on the bow next to the hatch. Dubon ran to his sleeping quarters, grabbed a life jacket and, as he emerged, Captain Paprocki appeared from an after door of the ESTO FLEET and said "You are next." Dubon jumped overboard. Paprocki fired twice but missed. Dubon was picked up about twelve hours later by a Mexican fishing boat.

On the next morning, November 19, 1987, Captain Grisham of the TOBY JEAN saw the ESTO FLEET towing the MISS SONDRA LEIGH tied up alongside towards the open sea. The MISS SONDRA LEIGH was partially submerged and no one appeared to be on board her. Captain Grisham contacted Captain Paprocki by radio and was informed by him that the MISS SONDRA LEIGH had sprung a leak and that its crew was on the beach. Captain Paprocki appeared to be drunk, or at any rate not in normal condition. Captain Grisham followed the ESTO FLEET.

Early in the afternoon Captain Grisham saw the MISS SONDRA LEIGH strung out aft of the ESTO FLEET on a single line, sunk down to her decks but still upright. Captain Paprocki pulled the MISS SONDRA LEIGH back and forth until he capsized her, cut his

line to her, rammed her three times with the steel-hulled ESTO FLEET, and departed. Captain Grisham tied a buoy to the rudder shoe of the MISS SONDRA LEIGH and returned to Port Isabelle.

On November 20, 1967, the MISS SONDRA LEIGH was towed from twenty miles to within five miles offshore Mexico, at which time Captain Tindall's body was discovered chained inside the fish-hold. The Mexican national's body was later discovered chained to the fuel tank.

The vessel was a constructive total loss. A survey showed that it had been rammed three times on the starboard side and two times on the port side while in a capsized position by a vessel with a V-shaped hull. The port side was holed in three areas. Two bullet holes were found aft of the hatch, favoring the starboard side of the pilot house, three in the overhead area and four bullet holes aft of the fishhold hatch in the aft deck near the center of the deck.

The policy issued to the plaintiff by defendant Citizens Casualty Company of New York provided coverage of the MISS SONDRA LEIGH in the familiar, aphoristic terms:

> Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the waters named herein, fire, lightning, earthquake, assailing thieves, jettisons, barratry of the master and mariners and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein.

The policy further provides:

> Notwithstanding anything to the contrary in this policy, this insurance is warranted free from claim for loss, damage, or expense caused by or

resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat or any taking of the vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise * * *.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

The District Court, trying the case without a jury, found as conclusions of law:

"1. When Captain Paprocki lashed down the bodies of the dead seamen to the MISS SONDRA LEIGH and towed her seaward, casting her away by towing her away so as to sink her and then exhorting a final flourish by ramming her, he acted with force against the insured property with the intention of permanently depriving the owner of the property so as to fall within the provision of the policy insuring against loss from 'assailing thieves.'

Captain Paprocki was an assailing thief.

"2. The defense of piracy was not established. Captain Paprocki was not a pirate, nor did his actions fall within the ordinary definition of piracy. The actions of Captain Paprocki were more in the nature of irrational murder and an attempt to destroy the evidence than that of 'robbery, murder or forceable depredation on the high seas, without lawful authority, in the spirit and intention of universal hostility.'"

ARGUMENT

POINT I

DOES THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR CONFLICT WITH *CALMAR v. SCOTT*, N.Y. 1953, 345 U.S. 427, 97 L.Ed. 1125, 73 S.Ct. 739?

In the *Calmar* case, supra, Calmar Steamship Corporation purchased "voyage" insurance from Scott which contained a war-risk rider insuring the vessel PORTMAR. A "British capture warranty" under the war-risk policy was described by this Court as follows:

> "A further warranty, known as the free of British capture warranty, carves a specific exception out of the war-risk rider. It holds the underwriters 'free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions . . . or allies, or by any forces acting in cooperation with or under the control of them or any of them.'
>
> "But a saving clause, following immediately, provides that 'unless the insured Vessel *is condemned this warranty shall not exclude losses otherwise covered by this policy* which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.'" (Emphasis supplied)

The PORTMAR left San Francisco, U.S.A., November 28, 1941, for Manila. She was at sea on December 7, 1941, when Pearl Harbor was attacked and diverted by the United States to Sydney, Australia. From there, she was sent to Brisbane, Port Darwin, Koepang (Island of

Timore - where she was attacked by enemy aircraft) and was finally returned to Darwin. After her return from the naval and air attack the PORTMAR was bombed and strafed by Japanese aircraft and abandoned at Port Darwin, thus becoming a constructive total loss.

This Court was called upon to determine two questions in this decision: Whether the British capture warranty excluded the loss and whether the voyage ended when the PORTMAR was requisitioned by a British ally.

The first question was decided in favor of coverage:

"Assuming that the policy was in force when the Portmar was attacked, there is no doubt whatever that the underwriters would be liable for the damages under the basic adventures and perils clause taken alone. Cf Standard Oil Co. v. United States, 267 US 76, 69 L ed 519, 45 S Ct 211. The capture and seizure warranty, on the other hand, would, of course, hold the underwriters free. We understand the war-risk rider to provide as follows: Risks which are covered by the adventures and perils clause, but which are excluded by the capture and seizure warranty, and only such risks, remain covered. These risks include, in the language of the adventures and perils clause, "Restraints and Detainments of all Kings, Princes and People," or, in that of the capture and seizure warranty, "restraint or detainment, or the consequences thereof . . . or any taking of the Vessel by requisition or other-

*[434]

wise." *The free of British capture warranty would, in turn, again very likely avoid liability in this case. But the war-risk rider makes the loss of the Portmar one which is "otherwise covered by this policy" within the terms of the saving clause in the British capture warranty. The loss is "other-

wise covered by this policy" because it is insured against elsewhere within it, that is, in the war-risk rider. Since the Portmar had not been "condemned" when she was damaged by "implements of war" the saving clause thus reinstates, in this case, coverage avoided by the free of British capture warranty, still assuming, of course, that the policy was in force at the time of the loss."

In regard to the "loss otherwise" clause in the policy, Scott contended that the "savings clause" (loss otherwise clause) excluded loss to the PORTMAR while under Allied restraint.[1] This contention was rebuffed by this Court's statement urged in Petitioner Felicione's brief in the case sub judice that "the terms of the savings clause" did not state that the vessel was protected when under allied restraint. (B 11) The quotation in *Calmar*, supra, which, according to Petitioner Felicione, is supposed to conflict in some way with the decision in the case sub judice, states:

"The underwriters resort to a second argument concerning the saving clause. They contend, not quite consistently with the earlier argument, that the clause was meant to save losses which occur while a vessel is under certain Allied restraints, limited in number, but not under others. The underwriters, upon the trial, offered to prove as much by an expert witness. No more need be said than that to vary the terms of the saving clause so as to make it mean what the expert in the District Court said it meant—which on its face it cannot mean—would be to reform the contract, and that the requirements of the equitable doctrine of reformation are not met in this case."

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[1] " * * 'unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.' "

Reduced to its simplest terms, Scott claimed that the "savings clause" excluded loss of the PORTMAR when seized by a British Ally. **This Court refused to consider such a contention since the "savings clause" did not remotely contain such language. Such a contention was ludicrous. This Court then held that the policy afforded coverage when the PORTMAR was seized by a British Ally.[2] The second question was also resolved against Scott.[3]**

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[2] " * We thus read the provisions of this policy as insuring against a loss such as that of the Portmar, though it be the consequence of seizure by a British ally. So, reasoning substantially along these lines, did the District Court, and it proceeded to hold the underwriters liable. The Court of Appeals assumed that the 'labyrinth of verbiage, within which lurks whatever contract was made, is to be understood to agree that, although the ship might at the time be under the 'restraint of princes', the policy should cover her loss . . .'"

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[3] "But it held that 'the policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it.' 197 F2d, at 796. The voyage had ended, the court said, because the dominion exercised over the Portmar by Allied authorities was complete, and was very probably intended to continue indefinitely. The policy, in turn, was no longer in force because it was written for a voyage and could not outlast it, any more than a voyage charter would. Precisely as frustration of the voyage would end the latter, so it releases an underwriter from further liability."

* * * * *

"But we are not required to accept the broad ground on which the District Court rested. It is not contended here that anything done by any officer or official on the scene or elsewhere before the Portmar was damaged made it explicit—and now objectively provable—that she would be detained indefinitely or even for such a period of time as might be thought to postpone her return voyage unreasonably. Such an explicit decision might at least more likely have come to the prompt attention of the owners, whereas in its absence, as here, no owner, whether on the scene or not, could so much as make an informed guess concerning the fate of the voyage. We do not decide that case, but we do hold that if a policy such as this is to provide any appreciable and safely predictable protection over and above that of a policy which does not insure at all against consequences of Allied detainments, coverage cannot be said to have ended before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage."

What the quotation urged by Petitioner in *Calmar* has to do with the decision in the case at bar is not discernible. It does not conflict with anything in the Circuit Court of Appeals decision here. Petitioner obviously contends that one cannot deny the plain meaning of an insurance clause in an insurance policy. But this has no bearing on this case since the Circuit Court of Appeals decision was solely based upon the clear legal meaning of the peril "assailing thieves".

The decision under review did not contain a reformation of contract by the Circuit Court of Appeals. The District Court held that under the facts of the case, Paprocki was an "assailing thief". The Circuit Court of Appeals held that the District Court was in error in determining what constituted the peril "assailing thieves".

Petitioner's brief is replete with recitals of what was or was not included in the trial briefs in the District Court. (B 8, 10, 11, 17) An examination of such briefs will readily reveal that *none* of the quoted authority upon which the Circuit Court of Appeals decision is based was brought to the attention of the District Court. Petitioner did not cite such cases in support of the question of "what was an assailing thief". Research was not concentrated in this area. When it was, the complete fallacy of the District Court's opinion was revealed.

Thus, the case at bar does not conflict with any past precedent; at the least, *Calmar*, supra. Instead it is consistent with judicial authority which begins in the 18th Century that an "assailing thief" is one who takes personal property from a vessel.

Petitioner is incorrect in contending that the Circuit Court of Appeals did not hold that the capture of the MISS SONDRA LEIGH constituted an "assailing

theft." (B 12) The Court held that the vessel was not lost because of actions under the peril "assailing thieves".

A second argument unconnected with the question of conflict is that a description of the property insured was wrongfully confined to the goods aboard a vessel. (B 12) Petitioner overlooks the fact that such a description contained the precise language "* * stores, boats and furniture." (B 7) Such a description is entirely consistent with the Circuit Court of Appeals' ruling.

POINT II

HAS PETITIONER BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE AT BAR?

Petitioner's quest to find some basis for a second appellate review leads it to claim that the decision under review will affect maritime insurance on a national level. (B 15, 16) This contention is without merit. Petitioner admits that there is scant authority dealing with the subject. Such a fact in and of itself warrants the conclusion that this decision lacks any great importance to anyone except the litigants themselves. This Court in *Fields v. United States*, D.C. 1907, 205 U.S. 292, 27 S.Ct. 543, 51 L.Ed. 807, said:

> "* In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of grav-

ity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

The Circuit Court of Appeals after exhaustive research pronounced this case to be "bizarre"[4] and concontaining a peril "infrequently defined".[5] There is no national question presented here but simply one of policy construction which follows age-old precedent. The decision of the Circuit Court of Appeals will not create chaos but will serve to properly and adequately inform those who have coverage under "assailing thieves" precisely what the coverage is meant to include.

For the first time, Petitioner claims a constitutional abridgement of its rights because it claims that the Circuit Court of Appeals took its property without due process of law in violation of the Fifth Amendment to the United States Constitution. (B 16-19) Nothing could be further from the truth. A Federal question cannot be raised for the first time in the Supreme Court, not having been litigated in the trial or lower appellate

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[4] See Appendix, Page 2.

[5] "We are convinced that the term 'assailing thieves' in marine policies provides for theft by force or violence of personal property on vessels, not coverage for the theft of the vessel itself. We have researched the subject exhaustively. All the authorities we found dealing with the term 'assailing thieves' arise in the context of taking of goods aboard a vessel: none construe the term with reference to a taking of the vessel itself. *See, e. g.*, Swift v. American Universal Ins. Co., 1965, 349 Mass. 637, 212 N.E.2d 448 and cases there cited; Babbitt, Goode & Co. v. Sun Mutual Insurance Company, 1871, 23 La.Ann. 314; Annot. 19 A.L.R. 3d 1150.
"The term 'assailing thieves' is of long standing, but has been infrequently defined. Its historical contour was succinctly developed in Swift v. American Universal Ins. Co., *supra*, * *."

tribunal. *Beck v. Washington*, D.C. 1962, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955, reh den 370 U.S. 965, 8 L.Ed 2d 834, 82 S.Ct. 1575. In reality, the Circuit Court addressed itself to Petitioner's claim that coverage was afforded by collision or barratry. The Circuit Court specifically found such contentions frivilous and unsupported by the facts of the case:

> "Concluding, as we do, that the loss of the MISS SONDRA LEIGH was not covered by a peril contemplated by either party or insured against in the marine policy issued by Citizens Casualty to Filicione, the judgment of the District Court is reversed and the cause is rendered." (A 11) (Opinion at 140)
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> "2. As we pointed out, we have declined to consider the arguments of Felicione made for the first time on appeal that the loss was a 'like peril to that of assailing thieves,' or was a like peril to that of 'barratry' or was a 'collision.' Only to prevent a miscarriage of justice must we give heed to such hopefully bolstering afterthoughts. *E.g.*, McCrea v. Harris County Houston Ship Channel Navigation District, 5 Cir. 1970, 423 F.2d 605, 610 n. 19; American Surety Co. of New York v. Coblentz, 5 Cir. 1967, 381 F.2d 185. This is plainly not such a case and deserves but scant passing remarks. No one until now ever remotely considered collision coverage and properly so, because the MISS SONDRA LEIGH was a total loss *before* the vessel was rammed. The claim of barratry is frivilous because Paprocki was neither master nor mariner of the MISS SONDRA LEIGH. Moreover, the general words 'all other like perils' cannot extend the scope of the policy to include perils beyond and entirely different from those specially enumerated. Feinberg v. Insurance Company of North America, 1 Cir. 1958, 260 F.2d 523, 527." (A 11) (Opinion at 140)

The decision under review held that Petitioner's argument concerning other areas of coverage should not be considered; *but even if the Court did consider such contentions, these contentions were completely without merit*. Petitioner cannot deny the precise clear English language contained in Footnote 2 quoted above. (Opinion at Page 140) (A-11)

There could be no coverage under the collision peril because the MISS SONDRA LEIGH was a constructive total loss *before* Captain Paprocki rammed her.

Barratry could not be claimed because Paprocki was not a master or mariner of the MISS SONDRA LEIGH. Paprocki was captain of the ESTO FLEET. The "like peril" clause which would be similar to "assailing thieves" would not under the definition of theft of personal property give petitioner any assistance in its quest for coverage.

The Circuit Court of Appeals simply held in unmistakable language that it did not have to consider petitioner's alternative claim for coverage and, if considered, such alternatives were legally unsound. This is not violative of the Fifth Amendment to the United States Constitution.

Due process of law simply means notice of the action brought and an opportunity to defend. *Nat. Bank v. Luckett*, Ky. 1944, 64 S.Ct. 599, 321 U.S. 223, 88 L.Ed. 692, 151 A.L.R. 824; *Baiard v. Hunter*, Ark. 1907, 27 S.Ct. 261, 204 U.S. 241, 51 L.Ed. 461. The enactment of the judicial process through law, in its regular course of administrative justice is "due process". C.A. Ohio 1956, 233 F.2d 220. Cert. Den. 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Without question, Petitioner was accorded such administrative justice.

It is remarkable that not one case from this Court or any other appellate tribunal is cited in support of Petitioner's claim that it was denied due process. Such claim stands naked and exposed as an unrealistic and unfounded attempt to raise a constitutional question in order to obtain a second appeal or review of the district court's decision by this Court. In this posture there are no grounds for granting certiorari.

POINT III

WAS THERE COVERAGE UNDER RESPONDENT'S MARINE INSURANCE POLICY FOR THE CONSTRUCTIVE TOTAL LOSS OF THE MISS SONDRA LEIGH?

(A) ASSAILING THIEVES

The Circuit Court of Appeals held that it was "convinced that the term 'assailing thieves' in maritime policies provides coverage for theft by force or violence of personal property on vessels, not coverage for the theft of the vessel itself."[6-7] The Court cited exhaustive authority in support of this conclusion. Petitioner has cited *none*.[8] (B 12-15)

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[6] (A 7) (Opinion at 139).

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[7] (A 10) (Opinion at 140).

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[8] Petitioner's comment in Footnote 4, Page 12 of its Brief to the effect that *Naylor v. Palmer* (1854) 10 Exch. 382; 2 C.L.R. 1202; 23 L.J.Ex. 323; 24 L.T.O.S. 83; 18 Jur. 961; 2 W.R. 621; 156 E.R. 492, Exch. Aff. S.Ct. sub nom — Naylor v. Palmer (1853) 8 Exch. 739, stands for the proposition that seizure of the vessel "was one of theft or analogous to it under the doctrine of ejusdem jenehis" is incorrect.

While on route to Callao, Peru, plaintiff Naylor's vessel was taken over by Chinese coolies who were being shipped to Peru as slaves. The coolies seized the boat and murdered the captain, re-

sulting in the complete loss of the boat. The perils of "piracy, rovers, and thieves" were covered by the policy. From a verdict for Naylor, Palmer appealed, claiming that the acts of the coolies which were the proximate cause of the loss, were not piracy. Defendant Palmer contended that the acts of the coolies were motivated by a desire not to proceed on the voyage and to avoid slavery. In overruling this contention, Colridge J. stated:

> "*The admitted seizure of the vessel by them, the taking her out of the possession and control of the master and crew, and the diverting her from the voyage insured, were either direct acts of piracy or acts so entirely ejusdem generis, that, if not reducible to the special words of the policy,* they are clearly included within the general words at the end of the peril clause.
>
> "The question then arises on the pleas, and the principle that the proximate cause was to be looked to was admitted, indeed insisted on, equally by both sides on the argument. The decision of the case therefore depends simply on a question of fact, what occasioned the loss? and this will be answered by determining another, when did the loss occur? If no loss occurred until after the Coolies had restored to the mate and crew the possession and control of the vessel, she being at that time in a fit condition to prosecute the original voyage and carry them to their destination, then their not being so carried to it may be referable solely and proximately to their unwillingness to be so carried. *But if the loss was complete as soon as they had murdered the captain and forcibly taken possession of the vessel,* and for a time put an end to the voyage, then the loss is referable proximately to that unlawful act of theirs, and the motive which induced them to commit it; their unwillingness, namely, to be carried to their original destination is immaterial to be considered, because remotely only the cause of what occurred.
>
> "We think the latter is clearly the true view of the case, and that nothing can make it more clear than the simple statement. Nothing was then wanting to make the loss complete. A change of circumstances might have reduced [390] it; this, however, never occurred, and therefore may be dismissed from consideration." (Emphasis supplied)

The history of the development of the maritime meaning of thieves and assailing thieves goes back to the 18th century. It originated with the provisions covering early 18th Century vessels for loss of goods, stores, or tackle on board the vessel. In other words, personal property on board the vessel. It has never been applied to theft of the entire vessel. A special coverage or peril "theft of the entire ship" has been used to cover such an event. Petitioner's policy does not have such a clause in the case at bar.

Unassailable proof that such a construction has been placed upon the clause "thieves" and "assailing thieves" is easily furnished.

In Arnold Eleventh Edition, the subjects pirates and thieves are treated separately, and are stated as constituting separate perils. (See Section 836, supra, this Brief, Page 23). Section 837, Page 1088 of Arnold deals with the definition of thieves:

> "837. Secondly, as to thieves, it is provided by the Rules for Construction of Policy *(t)* that the term 'does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.'
>
> "The theft that is insured against in the policy means that which is accompanied by violence *(latrocinium)*, and not simple theft *(furtum)*; it being an old and elementary rule of the law of insurance that *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes the master might have prevented by the exercise of due vigilance, and the loss arising from which he consequently ought to bear *(u)*."

In Winter Marine Insurance, 3rd Ed., Page 87, theft of goods on board ship is discussed:

"Standards. Even the seemingly prudent course may result in establishing commercial standards through competitive price cutting that approach a situation which is against public policy. For instance, many years ago no underwriter ever considered insuring against petty thievery, now commonly known as *theft and pilferage*. The underwriter was willing to protect a merchant against assailing thieves, against whose activities he was powerless to protect himself. However, by proper packing, the merchant could largely eliminate the hazard of petty thievery. Some underwriters, eager for premium, offered to assume the hazard of pilferage. Some merchants accepted the offer, and the problem developed. If the premium charged was less than the extra cost of good packing, the imprudent merchant paid the premium and shipped his goods in inferior packages. Goods that arrive at destination in imperfect condition do not cultivate good relations, and if many shipments so arrive, a merchant may lose his markets to those merchants of his own or other countries who seek to carry out their commercial obligations on a high level of business conduct. Any system relieving a merchant or a shipowner of any obligations that he should assume tends to break down those standards of commercial practice the observance of which creates international commercial good will."

Further, at Page 184 of Winter:

"Thieves. The peril of *thieves*, as covered by the marine-insurance policy, is generally recognized by merchants and by the textbook writers as that of the taking of property by force, as distinguished from taking by stealth, which latter form of larceny is known by the specific term *pilferage*. *It was always the intention of underwriters to protect property on vessels from losses occasioned by*

the criminal acts of those who obtained access to the property by force. Pilferage, however, was not contemplated by the underwriter when property was insured, because such loss was supposed to be the result of the criminal acts of those who had a right to be with the property, such as stevedores or others who by stealth mingled with them and thus had access to the goods. Unfortunately, this theory and practice were overridden in certain state courts, where the judges, in an academic discussion of the meaning of the word 'thieves' ignored for the most part the practice of merchants and underwriters which, of old, was the basis on which marine-insurance law was determined and held that the word 'thieves' covered what is commonly known in marine circles as pilferage. Accordingly, most policies in use in the United States have inserted the words 'assailing thieves' in order to make clear the original and present intention of underwriters insuring against thieves. No such interpretation has been given to the word 'thieves' in the English courts, but in the Marine Insurance Act, Par. 9 of the rules for construction reads: 'The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.' Such clandestine theft, under the term *pilferage*, is now commonly included in marine policies. The results of including this hazard in the years immediately following the two world wars were very disasterous to underwriters. The granting of pilferage insurance meets a need of the merchant but is unsound in principle in that it creates a tendency to lessen the care of the shipowner for property in his custody. It also has a tendency to make the merchant less careful in packing his goods for shipment."

Winter thus recognizes that the original clause "thieves" in maritime policies was meant to cover "property on vessels." American policies added the

word "assailing" to "thieves' to exclude pilferage or the taking of property on ship by the crew. In *Swift v. American Universal Insurance Company* (Mass. 1965) 212 N.E. 2d 448, plaintiff's yacht was tied up at a pier in Neponset. When the crew went ashore, someone smashed in a plywood "patch" covering a window which was undergoing repair. They entered the cabin and stole personal property valued at $3,600.00. Plaintiff's policy covered loss by "assailing thieves" and "theft of the entire yacht." The court held that the loss was covered by assailing thieves and said:

> "* * * *Specifically, it argues that it has not been shown to have been caused by 'assailing thieves'.* It appears that, in times long past, marine insurance policies covered losses at the hands of 'Pirates, Rovers (and) Thieves.' Beawes, Lex Mercatoria Rediviva, 245 (1754). Jacob, Law-Dictionary, Vol. II, Insurance, I, 1 (1797). *The word 'thieves' in marine insurance was held to apply to persons, not connected with the insured vessel, who committed thefts by force or violence* in Marshall v. Nashville Marine & Fire Ins. Co., 20 Tenn. 99, 101 (1839). At approximately the same time, however, in New York, the meaning of 'thieves' in marine insurance was held to include secret and nonviolent larceny even though committed by persons employed or working on the vessel. * * *" (Emphasis supplied)

In an annotation "Risks Covered by Marine Insurance Policy Against Theft" 19 A.L.R. 3rd 1150:

> "Applicable provisions of marine policies may state the coverage in terms of losses due to either 'thieves,' 'assailing thieves,' *'theft of the entire ship,'* or general 'and all other like perils.' Before the last-mentioned clause may have applicability to thefts, of course, there must be a specific enumeration of some form of theft coverage preceding such clause.

> "Protection against 'thieves' was apparently intended by early marine insurers to cover only thefts accompanied by violence, as opposed to secret thefts, such as might be suggested by the different connotations of 'robbery' and mere 'stealing.' To avoid the construction placed upon the word 'thieves' by some courts that it included secret thefts without violence, the word 'assailing' was added to 'thieves' by the insurers, to include coverage only where the taking is accomplished by violence, either by forceful entry or forceful taking." (Emphasis supplied)

In the following cases, goods or property were stolen and held to be covered within a policy insuring against "thieves." *Atlantic Ins. Co. v. Storrow* (1835 N.Y.) 5 Paige 285; *American Ins. Co. v. Bryan and Maitland* (1841 N.Y.) 1 Hill 25, Affd. 26 Wend. 563; *Spinetti v. Atlas S. S. Co.* (1880) 80 N.Y. 71; *Bridge v. Niagara Ins. Co.* (1829) 1 N.Y. Supr. Ct. (1 Hall 423) 467; *Marshal v. Nashville N. & F. Ins. Co.* (1839) 20 Tenn. (1 Humph.) 99.

The insurance of the MISS SONDRA LEIGH covered equipment, stores, boats and furniture. These were covered by "assailing thieves." If the vessel was covered for theft as the District Court held, what is the meaning of the exclusion of capture, seizure, and piracy? Why would such exclusions be written into the policy? The answer must be that they were meant to cover specific perils which have specific maritime meaning and significance. Captain Paprocki did not intend to *steal* the vessel when he shot Tindall and the Mexican national. His sole purpose was murder. If his motive was theft, he would have kept the boat. Instead when Grisham first saw the ship it had already been scuttled.

In *Feinberg v. Insurance Company of North America* (5th Cir. 1958) 260 F.2d 523 (reversing case at 161 F.Supp. 686) the yacht MARIPOSA was scuttled when the boat was moved from its moorings in the Neponset River in Dorchester to another dock ninety feet away. A small drain plug was unscrewed under the cabin. Personal property such as a T.V., fishing tackle, etc., was taken. The MARIPOSA was insured against "assailing thieves" and "theft of the entire yacht." The District Court held that there was no coverage and found for the insurer, North America. The Fifth Circuit reversed holding that the policy covered the loss as being a "theft of the entire yacht." This Fifth Circuit further held that the loss (scuttling) could not have been covered by the "assailing thieves" peril in the policy.

The author's comment in 19 A.L.R. 3rd 1150 at 1152 supports this interpretation:

> "Thus, loss of personal property taken from a yacht which had been moved 90 feet to another dock and thereafter scuttled, was said by the court in Feinberg v. Insurance Co. of North America (1958, DC Mass) 161 F Supp 686, vacated on other grounds 260 F2d 523, not to be within the coverage of a marine insurance policy providing *against loss from assailing thieves.* Although the plaintiff, suing on the policy, did not contend that the loss was occasioned by such assailing thieves, *the court briefly mentioned in passing that such contention could not be made.*" (Emphasis supplied)

(B) CAPTURE OR SEIZURE

So that this Court can satisfy itself, if it desires, that the loss of the MISS SONDRA LEIGH was excluded, it is clear that the loss of the MISS SONDRA LEIGH was excluded by the capture or seizure war-

ranties in the policy. If the vessel was lost due to capture or seizure, of course there would be no coverage.

The facts in this case show that Captain Paprocki captured the MISS SONDRA LEIGH. Paprocki either killed or drove off the vessel's entire crew. When Duhon jumped overboard, Paprocki obtained entire control of the vessel. The specific warranty against capture or any taking of the vessel stated:

> "Notwithstanding anything to the contrary contained in this policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; * *" (Lines 151-154 of policy)

This clause first specifies that notwithstanding anything in the policy loss by capture, seizure, restraint or the *consequences* thereof or any attempt or any taking of the vessel is excluded. This clause excludes the loss of the MISS SONDRA LEIGH on its face. A case essentially in point is *Kleinwort v. Shepard* (1859) 1E&E 447; 28 L.J.Q.B. 147; 32 L.T.O.S. 313; 5 Jur.N.S. 863; 7W.R. 227; 120E.R. 977. Here action was brought for the entire loss of the "Henriette Marie." A declaration in the policy declared the ship to be "warranted free from capture and seizure, and the consequences of any attempt, threat, upon any kind of goods etc. and upon the body, tackle." This clause was essentially identical to the exclusion in Petitioners policy in the case at bar.

The "Henriette Marie" sailed from Macao with her destination as Havana, Cuba. On board were 350 Chinese emigrants. While on the high seas the emigrants

assaulted and *killed* the captain and crew and took the ship. The issue before the Court of Exchequer was whether coverage was afforded the owners of the vessel or whether coverage was excluded as coming within the provision or warranty against capture. The appellate court found for the insurer and stated:

> "* * * The loss disclosed would clearly come within the general enumeration of perils which, according to the policy, the assurers were contented to bear and took upon themselves. But the defense rests on the previous words, warranted free from capture and seizure, and the consequences of any attempt thereat.' The contention on the part of the defendant is that this is a loss by seizure within the meaning of the warranty.
>
> "That the loss as alleged in the declaration, is a loss by seizure, according to the common meaning of that word in the English language, can admit of no doubt. Dr. Johnson defines 'seizure' to be '*the act of taking forcible possession.*' The declaration alleges that, while the ship was proceeding on the voyage insured, and while she was on the high seas, the Chinese emigrants 'piratically and feloniously assaulted the captain of the ship and divers of the crew, and piratically and feloniously by force took, stole and carried away the ship, and the [454] provisions and stores then being on board of her, from the custody and possession of the captain and crew, whereby and by reason of which piracy and theft" a total loss accrued to the assured. We cannot suppose from this warranty, as was suggested, that the Coolies merely diverted the ship from the due course of her voyage, making a temporary use of her, that they might escape from bondage. It thus becomes necessary for the plaintiffs to shew that the word 'seizure' is used in the warranty in some peculiar and limited sense.
>
> • • •

"We believe that a warranty in this form is sometimes introduced into policies, when there is an apprehension of war, with a view to protect the underwriter from belligerent risks, and to make him contented with a peace premium. But, where it is introduced, there is no decision that it must be confined to belligerent seizure; and we clearly think that it would extend to a *capture or seizure by pirates.*

"Then, argued Mr. Wilde, it must, at all events, be confined to a seizure by violence from without, excluding any thing to be done by those who were lawfully on board the ship. But what reason is there for such a restriction, in the absence of any allegation upon the record of any peculiar mercantile usage of the expression, and in the absence of any judicial decision imposing this restricted meaning upon it? *If the crew, intending to turn pirates, were to murder the captain and to run* [455] *away with the ship, would not this be a loss by seizure?* The Coolies were passengers, no doubt; but suppose that, during the voyage of an emigrant ship, the emigrants, intending to turn pirates, should murder the captain and the crew, and run away with the ship, would this not be a loss by seizure? *We think that it would.* The conjectural motives which may have influenced the parties to the policy cannot influence us. (Emphasis Supplied)

• • •

"However this may be, we must form our opinion of the intention of the contracting parties from the plain meaning of the language they have employed; and therefore give judgment for the defendant."

This case demonstrates error in the case sub judice. Capture or seizure is the act of forcibly taking possession of the ship. Lord Campbell flatly stated that the killing of the captain was was a seizure by *pirates*. The only

difference in *Kleinwort* and the case at bar is that the Chinese emigrants were original passengers on board the ship and Captain Paprocki was a passenger who boarded after the ship was on the high seas. This distinction is obviously immaterial.

In Arnold on Marine Insurance, Eleventh Edition, Section 829, Page 1067, it is stated:

> "829. Capture, properly so called, is a taking by the enemy as prize *(f)*, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken *(g)*. "Capture" by itself probably means belligerent capture only *(h)*. Seizure, however, includes other seizures, such as one by revenue or sanitary officers of a foreign state *(i)*.
>
> "The arrest, or carrying in for adjudication, of neutral ships by belligerent cruisers, *though not properly called capture in cases where there is no intent to deprive the owner of his property in the ship*, yet falls within the meaning of the words 'takings at sea' as one of the perils insured against; and the loss thence arising would be recoverable under a count alleging loss by capture. (Emphasis Supplied)
>
> • • •
>
> "As we shall see more at large hereafter in treating of abandonment, *capture is prima facie a case of total loss*, which gives the assured an immediate right to give notice of abandonment." (Emphasis Supplied)

The District Judge held that when Captain Paprocki lashed the dead bodies to the boat and cast the boat away, towing her in such a manner to sink her and finally ramming her "acted with force against the in-

sured property with the intent to permanently dispossess the owner of the property so as to "become an 'assailing thief.'" Yet all case law holds that depriving the owner of a vessel is a capture or seizure. What the District Judge failed to recognise is that an "assailing thief" is one who steals *personal property* on the boat and not the entire vessel itself. *At the moment Captain Paprocki chased Duhon overboard, he had completed a capture or seizure of the boat.* At the time of the capture, the owners suffered a total loss of the boat and its capture was the proximate cause of the loss. The loss occurred at this point, not when the boat was overturned and rammed as held by the District Judge.

Defendant's argument is further supported by the statements found in 45 C.J.S. Insurance, Section 863, Page 939:

> § 863. Capture, Seizure, and Takings at Sea. Capture, seizure, takings at sea, and war risks are perils insured against under the terms of various policies.
>
> "The risk of capture and seizure may be insured against, or the policy may expressly cover war risks, or, as is more customary, the policy may except such risks from the coverage assumed, as shown infra § 876. *Capture includes all hostile takings made with intent to deprive the owner or made for the purpose of putting the property taken to a specific use for the benefit of the captor.* It is a capture whether the taking is lawful or *unlawful*, by *friends* or allies, enemy or belligerent, or by *pirates*.
>
> "*Seizure.* Seizure imports the taking possession of a ship or vessel by superior force, or by violence from without, such as the taking of a ship by the act of governments or other public authority for a

violation of the laws of trade, or some rule or regulation instituted as a matter of municipal policy, or in consequence of an existing state of war, and whether or not by lawful authority; but it does not extend to a barratrous conversion by the officers and crew, or either of them. (Emphasis Supplied)

Finally, in *Dole v. New England Mutual Marine Insurance Company* (1863) 88 Mass. 373, the ship "Golden Rocket" was seized, looted and burned by the armed steamer "Sumpter" under the flag of the Confederate States of America. A total loss was claimed by the owner of the "Golden Rocket". The policy was warranted against capture or seizure:

"The policies on which the plaintiffs seek to recover contain the usual clause descriptive of the risks which the insurers are contented to bear, as follows: 'the sea, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes or people, of what nation or quality soever, barratry of the master, (unless the insured be owner of the vessel,) and of the mariners, and all other losses and misfortunes which have or shall come to the damage of the said vessel or any part thereof.' In the margin of one of the policies there is a printed stipulation of this tenor, viz: 'Warranted free from capture, seizure or detention, or the consequences of any attempt thereat; the clause herein embodied touching said perils or adventures to the contrary notwithstanding.' In the other policy a similar warranty is thus expressed: 'Warranted by the assured free from loss or expense arising from capture, seizure, detention, or the consequences of any attempt thereat, any stipulations in the policy to the contrary notwithstanding.' The purpose of inserting this warranty is manifest. It is designed to exempt the insurer from certain risks which are enumerated in the general clause above cited, and in legal effect strikes them from the con-

tract. Of these excepted risks for which the insurer is not to be liable, the first named is a loss of the vessel by capture. It is contended on the part of the defendants that the facts proved at the trial bring these cases within the fair meaning of the warranty, and that the plaintiffs are not entitled to recover on the policies, whether the ship was taken by persons who may be properly designated as pirates or not, or whether their acts were lawful or unlawful, *because the loss was caused by acts which constituted a capture*, in the sense in which that word is used in the contract." (Emphasis supplied)

In holding that the word "capture" covered *all* unlawful takings of vessels by force, the Court said:

"On turning to elementary treatises on the subject of insurance, it will be found that the most approved of the text writers do not restrict the meaning of the word 'capture' so as to limit its signification to the taking of ships or vessels by belligerents engaged in lawful war, nor to their forcible seizure by the acts of governments; but that it is also used by them to signify *any unlawful taking by force, by whomsoever the act is accomplished*, and that it includes a piratical taking as well as those made *jure belli*. Thus in Marshall on Insurance, (4th edit. by Sergeant Shee,) 394, we find this definition: 'Capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.' He adds: 'Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war; and unlawful, when it is against the rules established by the law of nations. But in general, for every loss occasioned by capture, whether lawful or unlawful, the insurer is liable, the words of the policy being sufficiently comprehensive to include, *and a warranty 'free from capture or seizure' to exclude, every species of capture to which ships at sea can ever be exposed.*' So

in 2 Arnould on Ins. 808, it is said: 'Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise. But its legality or illegality does not affect the liability of the underwriter as against the assured; whether lawful or unlawful, or however made, capture, when the proximate cause of loss, renders the underwriter liable under a policy alleging the loss to be by capture. (Emphasis supplied)

• • •

"In Phil. Ins. § 1110, it is stated that 'the word 'capture' is of itself broad enough to comprehend any forcible seizure, arrest or detention which may be lawfully insured against.' So Chancellor Kent says: 'Every species of capture, whether lawful or unlawful, is also a loss within the policy.' 3 Kent Com. (6th ed.) 304. Benecke, 348, in speaking of the causes of abandonment, enumerates capture and detention as being among the leading ones, and adds: 'Capture by an enemy or pirate is *prima facie* a total loss." It will also be found that the word 'capture' when not used with reference to the contract of insurance, is applied by legal writers of authority to the taking of vessels by pirates. Abbott on Shipping, (7th ed.) 27. 1 Kent Com. (6th ed.) 108. 2 Wooddes. Lect. 422, (Lect. xxxiv.) And such is the meaning attributed to it in the *St.* of U.S. of 1819, c. 77, §§ 2, 3, 4, enacted for the punishment of piracy. 3 U.S. Sts. at Large, 513.

• • •

"We have extended these citations to an unusual length, in order to make it apparent that in legal nomenclature there is no such limitation on the meaning of the word "capture" as that which must be given to it in order to charge the underwriters on these policies. It is true that there is no direct decision that a taking by pirates is a capture. Nor is there any to the contrary. Probably the precise

> question has never before arisen. But we think it cannot be doubted that such an application of the word is not inapt or unusual, but is in conformity to long established and well considered legal phraseology."

The above authority is explicit that the peril "capture" is broadly defined in marine insurance to cover *all* takings of ships under *all* conditions. If this were not enough, the broad language contained in the warranty excluding capture in the case at bar is sufficient to encompass Captain Paprocki's seizure and ultimate destruction of the MISS SONDRA LEIGH. Paprocki was a pirate who captured the MISS SONDRA LEIGH. It is insignificant what his later actions were after he took command of the vessel.

CONCLUSION

Petitioner seeks to invoke the jurisdiction of this Court by creating a claim of conflict with *Calmar v. Scott*, supra, decided by this Court, which is entirely remote in its application to the case sub judice. This contention is spiced by a claim of national calamity and denial of due process which in its claim demands swift reversal of the Circuit Court of Appeals' opinion under review.

The issues raised are analogous to the claim of Red China in the early and mid-1960's that the United States was a "paper tiger". This accusation of course meant that while the United States frequently showed its military claws, it, in reality, lacked military substance and capability and could be easily defeated. Petitioner's case here is like the proverbial Chinese "paper tiger" who proclaims conflict, denial of due process and catastrophic national maritime ramifications from the decision under review when in reality its position completely lacks legal substance. Accordingly, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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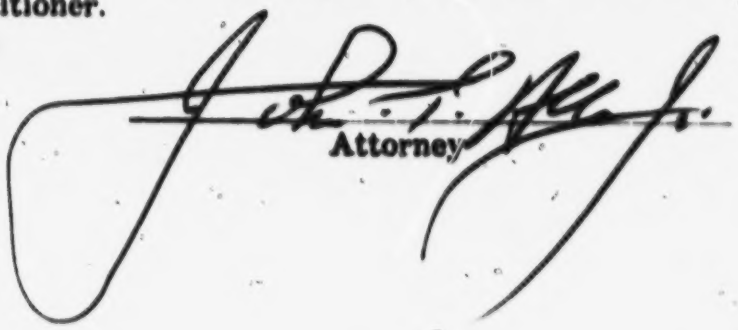
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the 25th day of January, 1971,, two copies of the foregoing Brief were furnished by mail to Chester H. Ferguson and Charles F. Clark of Macfarlane, Ferguson, Allison & Kelly, P. O. Box 1531, Tampa, Florida 33601, Counsel for Petitioner.



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